

Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

DIANNE L. KELLEY, KENNETH HANSEN,
JIM WALTERS, MATT MORALES,
RUSSELL HALL, and DON SCHRODER,
individually and on behalf of others similarly
situated,

Plaintiffs,

v.

MICROSOFT CORPORATION, a Washington
Corporation,

Defendant.

NO. C07-0475 MJP

DECLARATION OF MARK WILNER

CLASS ACTION

I, Mark A. Wilner, declare as follows:

1. ***Identity and Competency.*** I am an attorney with the law firm of Gordon Tilden Thomas & Cordell LLP. Together with Keller Rohrback, LLP, we represent the plaintiffs in the above-entitled action.

2. ***Rule 37 Conference.*** I was one of the attorneys for plaintiffs present during the parties' Rule 37 conference on September 25, 2008. During this telephone conference, counsel for Microsoft made it clear to us that, as a practical matter, Microsoft would never agree to Microsoft CEO Steve Ballmer being deposed in this litigation and that he (counsel for Microsoft)

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1 was instructed to obtain a court order on the issue. We neither “demanded” nor “insisted on” a
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3 full day to depose Mr. Ballmer. Nor did Microsoft’s counsel raise the option of a deposition for
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5 less than a full day. The actual amount of time practically required or necessary for the
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7 deposition was never addressed. Nor did we discuss other logistics, such as the location of the
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9 deposition. Counsel for plaintiffs did attempt to discuss scheduling in an effort to agree on a
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11 particular day that Mr. Ballmer would be available for a deposition in the event the Court ruled
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13 against Microsoft on its motion. However, counsel for Microsoft preempted such discussions by
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15 representing that: (a) Microsoft will not agree to the deposition; and (b) Mr. Ballmer would
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17 attend any day that the Court orders. Notwithstanding the above, counsel for Microsoft would
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19 not agree to reserve any date.
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21 3. ***Counsel’s Discussion of Mr. Ballmer’s Knowledge.*** During the Rule 37
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23 conference, counsel for the parties discussed Mr. Ballmer’s knowledge of pertinent facts. We
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25 discussed the fact that Mr. Ballmer is named in many documents that Microsoft has produced in
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27 this litigation. (We also had pointed this fact out to Microsoft’s counsel in written
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29 communication before our discovery conference. *See* Ex. K; *see also* Karlsen Decl. ¶ 2.) We
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31 also discussed the Ballmer-Ortellini telephone call in particular. We also discussed our position
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33 that the only two people on the call were the CEOs of Microsoft and Intel, and that Microsoft’s
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35 position on the so-called “apex” issue essentially would require us to depose a non-party CEO
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37 first. We stated that, in our view, none of the apex cases stands for such a proposition. We also
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39 discussed the fact that there was much more than merely one phone call that tied Mr. Ballmer,
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41 and his personal knowledge, to the issues in this case.
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1 4. ***The Ballmer Deposition Notice.*** I sent counsel for Microsoft a letter, dated
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3 September 26, 2008, which briefly summarizes the parties' Rule 37 conference and enclosed a
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5 deposition notice for Mr. Ballmer. A true and correct copy of the letter is attached as Exhibit I.
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7 As reflected therein, we noted the deposition for October 22, 2008—approximately one month
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9 after the parties' Rule 37 conference—precisely to allow ample time for Microsoft to present its
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11 motion, while at the same time avoiding the prejudice to our case preparation that would result if
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13 Microsoft postponed filing its motion too long. (During the Rule 37 conference, counsel for
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15 Microsoft did not indicate when Microsoft would file its motion.) The discovery cutoff is
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17 November 14, 2008, approximately three weeks after the deposition noting date. *See also* Ex. I.

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19 5. ***Prior Discovery Requests.*** By the time of Mr. Ballmer's deposition as currently
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21 noted, the parties will have deposed various fact witnesses, and conducted 30(b)(6) depositions
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23 of Microsoft and their eight designees thus far. These include the fact depositions of Jim
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25 Allchin, Will Poole, Rajeesh Srinivasan, and 30(b)(6) designees Kathryn Griffith, Lorraine Paull,
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27 Christine Mullaney Sundlie (twice), Scott Herrboldt, Brad Brooks, Mark Tindall, and Mark
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29 Croft—as well as the deposition of all six named plaintiffs. *See* Ex. J. In addition, plaintiffs
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31 have served 237 requests for admission and 83 requests for production of documents. We do not
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33 believe that any of these discovery devices would be a practical or reasonable way to learn more
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35 about Mr. Ballmer's personal knowledge. Mr. Ballmer's declaration, filed in connection with
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37 the present motion, confirms this belief.

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39 6. ***Authentication of Documents.*** Attached are true and correct copies of the
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41 following documents:

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44 **Document Name**

Exhibit

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DECLARATION OF MARK WILNER - 3
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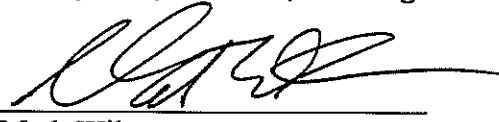
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Document Name	Exhibit
Excerpts from Microsoft's Form 8-K, filed with the SEC, on or about April 26, 2007	A
Documents produced by Microsoft in this litigation bearing Microsoft's MS-KELL bates-stamp prefix (compiled in bates-stamp chronological order) [<i>Stamped Confidential by Microsoft</i>]	B
Declaration of Rob Enderle with attached 3/21/06 email string between Steve Ballmer and Mr. Enderle, which was produced in response to plaintiffs' subpoena in this litigation	C
10/25/06 <i>San Jose Mercury News</i> article, "Steve Ballmer Talks About the Innovations in Major Windows Upgrade"	D
11/30/06 <i>Bloomberg News</i> article, "Microsoft's Ballmer Says Analysts Underestimate Vista (Update 3)"	E
Excerpts from 1/29/07 Microsoft Press Release, "Steve Ballmer: Partner Luncheon and Press Conference, Windows Vista and Microsoft Office 2007 Worldwide Availability"	F
Pages ¹ 1-4:12, 79-81:7, 89:16-91:25 of Uncertified/Rough Draft Transcript of the Deposition of Jim Allchin, taken October 7, 2008	G
Document produced by Intel in this litigation, responsive to plaintiffs' subpoena, bearing Intel bates-stamp number 406DOC000047-49 [<i>Stamped Confidential by Intel</i>]	H
Letter from me to counsel for Microsoft, dated September 26, 2008, summarizing the parties' Rule 37 conference	I
Cover pages of deposition transcripts in this case	J
Email string, dated September 23, 2007, between myself and Steve Rummage	K
Compilation of news articles, produced by Microsoft in this litigation, bearing MS-KELL 20519	L

¹ Because the deposition occurred two days ago, we have not yet received an official, certified transcript. The page numbers referred to above, and in plaintiffs' opposition, refer to the internal page numbers in the uncertified transcript.

1 I declare under penalty of perjury of the laws of the State of Washington that the
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3 foregoing is true and correct.
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5 Executed this 9th day of October, 2008, at Seattle, Washington.
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10 Mark Wilner
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CERTIFICATE OF SERVICE


I hereby certify that on October 9, 2008, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following.

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Jacqueline Lucien, Legal Secretary